Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK A. LUMSDEN, CAROLE KAY LUMSDEN
and STEPHENIE LUMDSEN CABANISS,

Petitioners,

vs.

LIBERTY MUTUAL INSURANCE COMPANY
and HELEN HARRIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RON ADKISON
Counsel of Record
WELLBORN, HOUSTON, ADKISON,
MANN, SADLER & HILL, L.L.P.
Attorneys for Petitioners
P. O. Box 1109
300 West Main Street
Henderson, Texas 75653
(903) 657-8544

149539

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in concluding that the district court correctly granted summary judgment in favor of Respondent, Liberty Mutual Insurance Company. [*See* Appendix — Exhibit A, per curiam opinion of the United States Court of Appeals for the Fifth Circuit (filed September 17, 1998); *see also* Vol. 1 at 52-58 ("Summary Judgment" order of the district court)].

2. Whether the Court of Appeals erred in concluding that the district court correctly denied the "Plaintiffs' Motion for Summary Judgment" filed by Petitioners. [*See* Appendix — Exhibit A; *see also* Vol. 1 at 52-58 ("Summary Judgment" order of the district court)].

3. Whether the Court of Appeals erred in concurring with and affirming the remainder of the conclusions, decisions and rulings of the district court, including:

   a. the granting of Liberty Mutual's motion to sever [*see* Vol. 1 at 18-31 (Liberty Mutual's motion to sever); *see also* Vol. 1 at 4-5 (district court's Order granting Liberty Mutual's motion to sever) and Appendix — Exhibit B];

   b. the subsequent dismissal with prejudice, after the severance, of all claims made by Petitioners against Liberty Mutual [*see* Vol. 1 at 18-31 (Liberty Mutual's motion to sever); *see also* Vol. 1 at 4-5 (district court's Order granting Liberty Mutual's motion to sever) and Appendix — Exhibit B];

4. Whether or not the Court of Appeals erred in basing its decision and opinion on events and/or correspondence occurring after Liberty Mutual offered to settle the underlying claims and Petitioners accepted Liberty Mutual's settlement offer (i.e., the Court of Appeals improperly based its opinion on events and/or correspondence occurring after a binding contract had been formed between Liberty Mutual and Petitioners).

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Cited Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. Course of Proceedings and Disposition in the Court Below	2
B. Statement of Facts	4
Reasons for Granting the Writ	6
I. The Petition Should Be Granted Because The Court Of Appeals Erred In Concluding That The District Court Correctly Granted Summary Judgment In Favor Of Respondent, Liberty Mutual Insurance Company.	6
II. The Petition Should Be Granted Because The Court Of Appeals Erred In Concluding That The District Court Correctly Denied The "Plaintiffs' Motion For Summary Judgment" Filed By Petitioners.	6

Contents

Page

III. The Petition Should Be Granted Because The Court Of Appeals Erred In Affirming The Remainder Of The Conclusions, Decisions And Rulings Of The District Court, Including: 9

A. The Granting of Liberty Mutual's Motion to Sever; 9

B. The Subsequent Dismissal With Prejudice, After the Severance, of All Claims Made by Petitioners Against Liberty Mutual. 9

IV. The Petition Should Be Granted Because The Court Of Appeals Erred In Basing Its Decision And Opinion On Events And/Or Correspondence Occurring After Liberty Mutual Offered To Settle The Underlying Claims And Petitioners Had Accepted Liberty Mutual's Settlement Offer (*i.e.*, The Court Of Appeals Improperly Based Its Opinion On Events And/Or Correspondence That Occurred After A Binding Contract Had Been Formed Between Liberty Mutual And Petitioners). 11

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Allied Elevator, Inc. v. East Texas State Bank of Buna, 965 F.2d 34 (5th Cir. 1992) 10

Scott v. Ingle Bros. Pacific, Inc., 489 S.W. 2d 554 (Tex. 1972) 9

United States Constitution:

Fifth Amendment 1

Rules:

Federal Rule of Civil Procedure 21 ..... 1, 13

Federal Rule of Civil Procedure 56 ..... 1, 6, 13

APPENDIX

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated And Filed September 17, 1998 ..... 1a

Appendix B — Order Of The United States District Court For The Eastern District Of Texas, Tyler Division Dated December 2, 1997 And Filed December 4, 1997 ..... 3a

Appendix C — Summary Judgment Of The United States District Court For The Eastern District Of Texas, Tyler Division Dated July 31, 1997 And Filed August 4, 1997 ..... 5a

Appendix D — Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing Dated And Filed October 15, 1998 ..... 14a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not published or otherwise reported. However, that opinion is attached to the Appendix as Exhibit A.

The opinions, decisions and rulings of the underlying district court are not published or otherwise reported. However, the relevant opinions, decisions and rulings are attached to the Petition as Appendix B ("Order" dated December 2, 1997 and filed December 4, 1997) and Appendix C ("Summary Judgment" order dated July 31, 1997 and filed August 4, 1997).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") was dated and filed on September 17, 1998. The Court of Appeals denied a timely petition for rehearing on October 15, 1998, and that order is attached to the Appendix as Exhibit D.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . .".

In addition, all parties to this appeal filed motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

After the Summary Judgment order was entered at the district court level, Respondent, Liberty Mutual Insurance Company, submitted and filed a motion to sever under Rule 21 of the Federal Rules of Civil Procedure. Respondent's motion to sever was granted by the district court.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below:

Plaintiffs/Appellants/Petitioners, Frank A. Lumsden, Stephenie Lumsden Cabaniss, and Carole Kay Lumsden ("Petitioners"), filed their original complaint against Defendant/Appellee/Respondent, Liberty Mutual Insurance Company ("Liberty Mutual"), alleging that Liberty Mutual breached a settlement agreement and contract. The settlement agreement and contract was by and between Petitioners and Liberty Mutual, and concerned a separate lawsuit involving the death of Frances Lumsden, who was the wife of Petitioner, Frank A. Lumsden, and the mother of Petitioners, Carole Kay Lumsden and Stephenie Lumsden Cabaniss.

Petitioners filed their original complaint in the district court, alleging that they had reached a settlement agreement and contract with Liberty Mutual involving the death of Frances Lumsden and that Liberty Mutual breached same. Vol. 2 at 388-91. Petitioners also submitted their jury demand in this case. Vol. 2 at 387. Liberty Mutual timely answered. Vol. 2 at 380-83. The case was assigned to Track 3 for case management purposes. Vol. 2 at 385. Petitioners and Liberty Mutual made their initial disclosures. Vol. 2 at 377; 378-79. Afterwards, the case was transferred by the Honorable David Folsom to the Honorable William Wayne Justice. Vol. 2 at 371-73. Petitioners made their first supplemental disclosure. Vol. 2 at 363.

A management conference was then held in the case. Vol. 2 at 357. Petitioners filed their elements of claims with the court, alleging that Liberty Mutual failed to pay its policy limits to Petitioners under the settlement agreement between Liberty Mutual and Petitioners regarding the death of Frances Lumsden.

Vol. 2 at 344-46. Liberty Mutual filed its summary of defenses and witness list. Vol. 2 at 351-56. In its summary of defenses, Liberty Mutual claimed that no valid contract and settlement agreement existed between it and Petitioners because there was no meeting of the parties' minds regarding all essential terms of the contract. Vol. 2 at 355-56.

At that point in time, the district court ordered Petitioners and Liberty Mutual to file cross motions for summary judgment. Vol. 2 at 347. Petitioners filed their motion for summary judgment on May 9, 1997. RE Ex. 10; Vol. 2 at 297-343. Liberty Mutual then filed its motion for summary judgment. Vol. 2 at 244-83; Vol. 1 at 70-178. On August 4, 1997, the "Summary Judgment" order in favor of Liberty Mutual was filed of record. RE Ex. 8; Vol. 1 at 52-58; *see also* Appendix — Exhibit C. The aforementioned judgment granted Liberty Mutual's motion for summary judgment, denied the Petitioners' motion for summary judgment and dismissed Petitioners' claims against Liberty Mutual with prejudice. RE Ex. 8 at 58; Vol. 1 at 58; Appendix - Exhibit C.

Afterwards, the Petitioners timely submitted several post-judgment motions, including the (1) Plaintiffs' Motion for New Trial and/or New Hearing (RE Ex. 5; Vol. 1 at 43-51); (2) Plaintiffs' Motion to Make and/or Specify Findings of Fact and Conclusions of Law (RE Ex. 7; Vol. 1 at 40-42); (3) Plaintiffs' Motion to Amend Findings of Fact and Conclusions of Law, and Make New Findings of Fact and Conclusions of Law (RE Ex. 6; Vol. 1 at 35-39); and (4) Plaintiffs' Motion to Alter and/or Amend Judgment (RE Ex. 4; Vol. 1 at 32-34).

Liberty Mutual also filed a post-judgment motion, a motion to sever the Petitioners' entire cause of action against Liberty Mutual from the Petitioners' claims against Defendant, Helen Harris. Vol. 1 at 18-31; *see also* RE Ex. 9; Vol. 2 at 239-43 (the Plaintiffs' First Amended Complaint). In an "Order" filed

of record on December 4, 1997, the district court denied all of the Petitioners' post-judgment motions, granted Liberty Mutual's motion to sever and ordered that the Summary Judgment referenced above was now a final judgment. RE Ex. 3; Vol. 1 at 4-5; *see also* Appendix — Exhibit B. Petitioners then timely submitted their Notice of Appeal of this cause. RE Ex. 2; Vol. 1 at 1-2.

In a two-page opinion that failed to address some key points of error, the Court of Appeals affirmed the judgment of the district court. Appendix — Exhibit A. Petitioners timely submitted their petition for rehearing, which was denied by the Court of Appeals on October 15, 1998. Appendix — Exhibit D.

B. Statement of Facts

The facts of this breach of contract action are relatively simple and straightforward, as evidenced by the Plaintiffs' Original Complaint, the Plaintiffs' Elements of Claims and the Plaintiffs' First Amended Complaint. *See* RE Ex. 9 and Vol. 2 at 239-43; Vol. 2 at 344-46; Vol. 2 at 388-91. Petitioners emphasize that all of the factual allegations made by them in the aforementioned documents have been properly verified via summary judgment affidavits. RE Ex. 10 at 303-25 and Vol. 2 at 303-25 (summary judgment Affidavit of Ron Adkison); RE Ex. 10 at 326-34 and Vol. 2 at 326-34 (summary judgment Affidavit of Frank A. Lumsden); RE Ex. 10 at 335-43 and Vol. 2 at 335-43 (summary judgment Affidavit of Carole Kay Lumsden).

On December 20, 1992, one Frances Lumsden was killed in an automobile accident in Rusk County, Texas. Vol. 2 at 328-29. She was the wife of Petitioner, Frank A. Lumsden and the mother of Petitioners, Carole Kay Lumsden and Stephenie

Lumsden Cabaniss. Attorney, Ron Adkison ("Adkison"), was retained by the Petitioners to represent them in connection with the death of Mrs. Lumsden and with regard to the instant case. RE Ex. 10 at 304; Vol. 2 at 304.

The vehicle that struck and killed Mrs. Lumsden, and any person driving that vehicle, were insured by a policy of insurance written and issued by Respondent, Liberty Mutual. Vol. 2 at 329. Petitioners are entitled to death and survivorship benefits under Texas law because of the injuries to and the death of Frances Lumsden. RE Ex. 10 at 304, 308, 329; Vol. 2 at 304, 308, 329. After Mrs. Lumsden's fatal automobile accident, the Petitioners made timely demand on Liberty Mutual under the aforementioned insurance policy. *Id.*

As early as and on May 17, 1993, Liberty Mutual tendered its claimed policy limit of $100,000 to Petitioners, Frank A. Lumsden, Stephenie Lumsden Cabaniss and Carole Kay Lumsden. RE Ex. 10 at 308, 311, 329; Vol. 2 at 308, 311, 329.

On June 8, 1993, the Petitioners accepted Liberty Mutual's offer of its policy limits. RE Ex. 10 at 308, 312, 329; Vol. 2 at 308, 312, 329. At that point in time and thereafter, a binding agreement existed between Petitioners and Liberty Mutual. In subsequent correspondence between Petitioners and Liberty Mutual, Liberty Mutual unequivocally acknowledged and confirmed the contract between the parties. RE Ex. 10 at 305, 308, 316 and Vol. 2 at 305, 308, 316 (letter from Liberty Mutual dated June 16, 1993); RE Ex. 10 at 317 and Vol. 2 at 317 (letter from Liberty Mutual dated January 13, 1994); RE Ex. 10 at 322 and Vol. 2 at 322 (letter from Liberty Mutual dated February 10, 1994).

Sometime in February 1996 — and completely unknown to Petitioners at that time — Liberty Mutual paid $80,000 of

its aforementioned policy limit of $100,000 to one Helen Harris, in violation of Liberty Mutual's contract and agreement with the Petitioners, as described above and herein. This $80,000 payment was made entirely without notice of any kind to the Petitioners. RE Ex. 10 at 305, 309, 330 and Vol. 2 at 305, 309, 330. Petitioners aver this improper and unauthorized payment by Liberty Mutual to Harris constitutes a material breach by Liberty Mutual of the written contract between Petitioners and Liberty Mutual.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, LIBERTY MUTUAL INSURANCE COMPANY.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE DISTRICT COURT CORRECTLY DENIED THE "PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT" FILED BY PETITIONERS.

The district court's Summary Judgment order and the Court of Appeals' opinion affirming same violated Respondents' rights to substantive due process, procedural due process and was improper and error under Rule 56 of the Federal Rules of Civil Procedure.

On May 17, 1993, Liberty Mutual tendered its claimed policy limits of $100,000 to Petitioners, Frank A. Lumsden, Stephenie Lumsden Cabaniss and Carole Kay Lumsden, in a letter to their attorney of record. *See* Vol. 2 at 308, 311. On June 8, 1993, the Petitioners accepted Liberty Mutual's offer of its policy limits to settle this case, via a letter from their attorney of record to Liberty Mutual. Vol. 2 at 308, 312. At that point in time, a binding agreement was formed between Petitioners and Liberty Mutual. Subsequent communications and correspondence did not alter the fact that a contract was created between Petitioners and Liberty Mutual on June 8, 1993. However, some of the subsequent correspondence certainly substantiated the formation of the agreement in question.

As emphasized by Petitioners in their brief on appeal, the district court's Summary Judgment order incorrectly applied the outdated "mirror image" rule of contract offer and acceptance. That rule has been rejected by both the Restatement (Second) of Contracts and the Uniform Commercial Code. Yet, the Court of Appeals failed to mention or address this significant question of law, as applied to the facts of this case, in its two-page opinion. Therefore, Petitioners implore this Court to grant this petition and further examine and elaborate on this crucial issue.

The district court acknowledged that the dispute in this case turned on the question of whether any offer was accepted by Petitioners. Vol. 1 at 52; RE Ex. 8. Liberty Mutual's letter of May 17, 1993, made a complete and unequivocal tender of its policy limits to the clients of "Atty Atkison (sic)". Vol. 2 at 311. The fact that Liberty Mutual did not know who all of the heirs of Frances Lumsden were is revealed by the last sentence of said May 17, 1993, letter — "Please **identify** and forward the names of all parties with an interest in Mrs. Lumsden's estate." *Id.* (Emphasis added). The aforementioned statement

by Liberty Mutual serves to illustrate that it did not know or care who all the heirs of Frances Lumsden were. Liberty Mutual was tendering the policy limits with identification to follow. Ergo, the exact identity of all of the heirs of Frances Lumsden was not an essential element or prerequisite to the tender of the policy limits. Furthermore, the flawed analysis of the district court improperly interprets the precatory phrase "[p]lease identify and forward the names . . ." (contained in Liberty Mutual's settlement offer letter of May 17, 1993) as either a term of the contract or a condition precedent. It is clearly neither. The position of the aforementioned phrase and sentence it was contained in coming **after** the tender of the policy limits, its failure to tie itself to the tender, and the mere fact that is a precatory phrase (i.e., "[p]lease . . .") deny it the import given it by the current district court opinion and judgment.

The acceptance by Petitioners of Liberty Mutual's offer is straightforward —

> If you would forward me the check and releases as well as a sworn statement that all applicable policies are as stated in you letter of May 17, 1993, we can conclude this matter.

See Vol. 2 at 312. The phrase "conclude this matter", which was contained in the Petitioners' acceptance, means prepare the paperwork to bring the matter to closure. It does not indicate in any manner that an agreement will be reached in the future. In addition, the subsequent correspondence involved in this case (as outlined in the Brief of Appellants) all reaffirms and substantiates the formation of a settlement agreement between Petitioners and Liberty Mutual on June 8, 1993.

Furthermore, the district court's Summary Judgment order incorrectly requires that an agreement be reached between

Liberty Mutual and the heirs of Frances Lumsden as to the tender of the policy limits, but also among the heirs of Frances Lumsden regarding the later apportionment of the proceeds. This improper requirement by the district court is clearly contrary to Texas law, as expressed in *Scott v. Ingle Bros. Pacific, Inc.*, 489 S.W. 2d 554 (Tex. 1972).

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED IN AFFIRMING THE REMAINDER OF THE CONCLUSIONS, DECISIONS AND RULINGS OF THE DISTRICT COURT, INCLUDING:

A. The Granting of Liberty Mutual's Motion to Sever;

B. The Subsequent Dismissal With Prejudice, After the Severance, of All Claims Made by Petitioners Against Liberty Mutual.

The district court granted Liberty Mutual's motion for summary judgment and denied Petitioners' motion for summary judgment via a "Summary Judgment" order signed on July 31, 1997, and filed of record on August 4, 1997. Vol. 1 at 52-58; Appendix — Exhibit C. Afterwards, Liberty Mutual filed a motion to sever Petitioners' claims against Liberty Mutual from Petitioners' claims against Defendant, Helen Harris (the mother of the deceased, Frances Lumsden). Vol. 1 at 18-31. Although adamantly opposed by Petitioners, the district court granted Liberty Mutual's motion to sever. Vol. 1 at 4-6; RE Ex. 3. This was error and should be further examined by this Court.

At the district court level, Petitioners did assert an independent fraud cause of action against Defendant, Helen

Harris. *See* Vol. 2 at 239-243; RE Ex. 9. Liberty Mutual had taken the position that its surreptitious $80,000 payment to Helen Harris somehow legally reduced the amount of funds available to be paid to Petitioners. Thus, Liberty Mutual's conduct injected Helen Harris into this dispute.

Significantly, Petitioners had alternatively pled that the contract in dispute was by and between Petitioners, Liberty Mutual and Helen Harris. Therefore, under the standards set forth in *Allied Elevator, Inc. v. East Texas State Bank of Buna*, 965 F.2d 34, 36 (5th Cir. 1992), the severance requested and obtained by Liberty Mutual would obviously **not** be capable of proceeding as a "discreet, independent action".

Therefore, the district court's granting of the severance and the Court of Appeals' affirmation of same were improper and constitute error in this case, because the severance obtained by Liberty Mutual was not capable of proceeding as a discreet, independent action.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED IN BASING ITS DECISION AND OPINION ON EVENTS AND/OR CORRESPONDENCE OCCURRING AFTER LIBERTY MUTUAL OFFERED TO SETTLE THE UNDERLYING CLAIMS AND PETITIONERS HAD ACCEPTED LIBERTY MUTUAL'S SETTLEMENT OFFER (*i.e.*, THE COURT OF APPEALS IMPROPERLY BASED ITS OPINION ON EVENTS AND/OR CORRESPONDENCE THAT OCCURRED AFTER A BINDING CONTRACT HAD BEEN FORMED BETWEEN LIBERTY MUTUAL AND PETITIONERS).

In its opinion, the Court of Appeals emphasized the following:

> Additionally, the summary judgment evidence makes it clear that Liberty Mutual was only interested in a total settlement with all potential claimants. Plaintiffs' counsel did not represent one of the potential claimants, Helen Harris, the deceased's mother. After Liberty Mutual identified Mrs. Harris and notified plaintiffs' counsel it wanted a release from her, plaintiff's counsel made no response.

Petitioners respectfully aver that the Court of Appeals improperly relied on communications and correspondence occurring after Petitioners had accepted Liberty Mutual's offer of settlement. This is error by the Court of Appeals and supports the granting of this petition.

Liberty Mutual made its settlement offer on May 17, 1993. Vol. 2 at 311. Petitioners accepted same on June 8, 1993. Vol. 2 at 312. All of the correspondence generated by Liberty Mutual regarding Helen Harris and/or any release from Helen Harris occurred **after** Petitioners had accepted Liberty Mutual's settlement offer. The Court of Appeals did not identify the specific communications or correspondence it relied on in the portion of its opinion quoted above. Therefore, this petition should be granted on that issue alone. In addition, all correspondence located by Petitioners referencing the identity of Helen Harris or any release from her was generated after June 8, 1993 — the date of Petitioners' acceptance of Liberty Mutual's offer of settlement. *See, e.g.*, Vol. 1 at 81, 94. Consequently, the granting of this petition is necessary in order to determine how and why this subsequent correspondence is relevant, since it occurred after the formation of the contract between Petitioners and Liberty Mutual.

Petitioners ask this Court to grant this petition and order the Court of Appeals to designate the specific communications or correspondence related to the quoted portion of its opinion set forth in this Reason No. IV and explain why any such communications or correspondence are relevant, as they occurred after Petitioners' acceptance of Liberty Mutual's offer of settlement.

CONCLUSION

The errors by the district court and the Court of Appeals, set forth above and herein, violated the Petitioners' constitutional rights and guarantees of substantive and procedural due process in this case. In addition, those errors further support the granting of this petition because they violated the relevant provisions of Rule 56 of the Federal Rules of Civil Procedure. Finally, the severance ordered by the district court and affirmed by the Court of Appeals was improper under Rule 21 of the Federal Rules of Civil Procedure and the interpretative authorities thereon.

Accordingly, Petitioners respectfully ask that their petition for writ of certiorari be granted.

Respectfully submitted,

RON ADKISON
Counsel of Record
WELLBORN, HOUSTON, ADKISON,
MANN, SADLER & HILL, L.L.P.
Attorneys for Petitioners
P. O. Box 1109
300 West Main Street
Henderson, Texas 75653
(903) 657-8544

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED SEPTEMBER 17, 1998

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-41541
Summary Calendar

FRANK A. LUMSDEN; CAROLE KAY LUMSDEN; STEPHENIE LUMDSEN CABANISS,

Plaintiffs-Appellants,

VERSUS

LIBERTY MUTUAL INSURANCE COMPANY; HELEN HARRIS,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(2:96-CV-173-WWJ)

Before DAVIS, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

In this action to enforce an alleged settlement agreement, the district court correctly granted summary judgment in favor of the defendant, Liberty Mutual.

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

For reasons stated in the district court's August 4, 1997 order, the court correctly determined that the two parties never reached a binding agreement. Additionally, the summary judgment evidence makes it clear that Liberty Mutual was only interested in a total settlement with all potential claimants. Plaintiffs' counsel did not represent one of the potential claimants, Helen Harris, the deceased's mother. After Liberty Mutual identified Mrs. Harris and notified plaintiffs' counsel it wanted a release from her, plaintiff's counsel made no response.

For these reasons and the reasons given by the district court, we affirm the judgment of the district court.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION DATED DECEMBER 2, 1997 AND FILED DECEMBER 4, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

2:96cv173

Frank A. Lumsden, Stephanie Lumsden Cabaniss, and Carole Kay Lumsden,

Plaintiffs,

v.

Liberty Mutual Insurance Company,

Defendant.

ORDER

Following the entry of summary judgment in this case, a variety of motions were brought by plaintiffs. These motions have been styled as a motion to alter and/or amend judgment, a motion to make and/or specify findings of fact and conclusions of law, a motion for a new trial and/or hearing, and a motion to amend findings of fact and conclusions of law and make new findings of fact and conclusions of law. In addition, a motion for severance of the cause of action between plaintiffs and Liberty Mutual Insurance Company has been brought by defendant Liberty Mutual. Because the court remains unpersuaded that plaintiff's evidence could show that a contract existed between plaintiffs and defendant, plaintiffs' motions

will be denied. In light of the interest in final and expedient resolution of this portion of the action, defendant's motion to sever, in accord with Federal Rule of Civil Procedure 21, will be granted.

The prior analysis contained in the summary judgement order needs no elaboration, and is thus affirmed.

Accordingly, it is

ORDERED that plaintiff's motions to alter and/or amend judgment, to make and/or specify findings of fact and conclusions of law, for a new trial and/or hearing, to amend findings of fact and conclusions of law and make new findings of fact and conclusions of law, should be, and are hereby, **DENIED**. It is further

ORDERED that defendant Liberty Mutual's motion to sever plaintiff's cause of action against defendant Liberty Mutual from the remaining cause of action between plaintiffs and defendant Harris should be, and it is hereby, **GRANTED.**

ORDERED and **ADJUDGED** that, by reason of the above severance, the summary judgement rendered by prior order of this court on all claims between plaintiffs and defendant Liberty Mutual is a Final Judgment, and all claims of plaintiffs against defendant Liberty Mutual should be, and are hereby, **DISMISSED WITH PREJUDICE.**

SIGNED this 2nd day of December, 1997.

s/ Wm. Wayne Justice
William Wayne Justice
United States District Judge

APPENDIX C — SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION DATED JULY 31, 1997 AND FILED AUGUST 4, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

2:96cv173

Frank A. Lumsden, Stephanie Lumsden Cabaniss, and Carole Kay Lumsden,

Plaintiffs,

v.

Liberty Mutual Insurance Company,

Defendant.

SUMMARY JUDGMENT

Frank A. Lumsden, Stephanie Lumsden Cabaniss, and Carole Kay Lumsden, plaintiffs in the above entitled and numbered civil action, are the husband and daughters of Frances Byrd Lumsden, who was killed in an automobile accident in Rusk County, Texas, on December 20, 1992. Defendant Liberty Mutual Insurance Company insured the car which struck and killed Frances Lumsden. Plaintiffs claim defendant contractually agreed to pay them the limits of their insurance policy on that other car. Defendant disputes that any such contract was made. Both sides have filed motions for summary judgment. Defendant's will be granted; plaintiffs' will be denied.

Appendix C

I. Factual Background

The summary judgment evidence presented consists largely of letters between the parties over the course of several years. During this correspondence, a number of offers were made. The instant dispute turns on the question of whether any offer was accepted. A review of the correspondence follows:

On May 17, 1993, defendant offered to pay $100,000, the limits of the applicable insurance policy, "for a release of any and all potential claims" against the policy arising from Frances Lumsden's fatal car accident. The letter was addressed to attorney Ron Adkinson, and requested that Adkinson, "identify and forward the names of all parties with an interest in Mrs. Lumsden's estate."

Adkinson wrote back on June 8, 1993. He requested "the check and releases," pursuant to defendant's letter of May 17, 1993, and he asked for "a sworn statement that all applicable policies are as stated in your letter May 17, 1993."

On June 16, 1993, defendant wrote that the applicable releases would be prepared by attorney John Mercy. Defendant requested information about Frances Lumsden's will, if one existed, and defendant again requested the names and addresses of all parties with an interest in the estate. "I understand she is survived by her husband, mother, and two daughters. Once we obtain this information, we can move forward with issuing the check and a release stating that there are no other applicable policies for this loss."

Plaintiffs provided a requested list of parties with an interest in Frances Lumsden's estate on June 21, 1993. "Her surviving

husband, Frank A. Lumsden, and surviving daughters, Carole K. Lumsden and Stephanie L. Cabaniss, are all of the parties with an interest in her estate." Frances Lumsden's mother, Helen Harris, was not named as an interested party.

On June 29, 1993, Mercy sent a proposed claims release to plaintiffs. "You will note that it includes one Helen Harris. Based upon the obituary for Ms. Lumsden, it would appear that Ms. Harris was Ms. Lumsden's mother and survived her. Please confirm this or provide me with other documentation as to whether Ms. Harris has a claim in this matter." In the attached "release of claims," defendant agreed to pay $100,000 to the three plaintiffs and to Helen Harris, but the way this sum would be apportioned among the four was not specified. Mercy requested that plaintiffs inform him if they wished for any changes to be made to the proposed claims release.

Subsequently, several letters were sent by defendant to plaintiffs asking them to either sign the proposed claims release or request changes be made to it. *See* Letter of July 22, 1993 ("Upon receipt of the final, signed release, I will issue the settlement check."); Letter of August 30, 1993 ("[P]lease advise me as to what is going on."). Plaintiffs have not presented evidence of a response to the letters of June 29, 1993, July 22, 1993, and August 30, 1993.

On September 24, 1993, Adkinson wrote to Paul Nelson, attorney for Helen Harris, to inform him that he was representing Frank Lumsden, Stephanie Lumsden Cabaniss, and Carole Kay Lumsden. "I have been in communication with the insurance carrier and they are willing to pay. Please tell me the amount of her claim so I can notify the carrier." Nelson responded on September 27, 1993, "I have contacted Mrs. Harris

to come into my office, and I will get back with you after I have spoken with my client concerning this matter."

On November 4, 1993, Mercy suggested to Adkinson and Nelson that the three of them meet "to discuss the possibility of settling this matter." When neither Adkinson nor Nelson responded, Mercy repeated the suggestion in a second letter, sent on December 8, 1993. The summary judgment evidence does not include any response to this second request for a settlement meeting.

On January 13, 1994, defendant sent plaintiffs documentation about the insurance covering the other car involved in the fatal accident. In this letter, defendant again offered the policy limits to settle the matter. "We have tendered out primary policy limits to the heirs of Mrs. Lumsden. Let me know how they wish to apportion the $ 100,000." On April 11, 1994, defendant reiterated the offer made in its January 13, 1994, letter. "We have still not received a response to our offer. Please review your file and inform me of your position."

On May 9, 1994, defendant asked whether plaintiffs would be willing to go to mediation in an attempt to resolve the matter.

No further correspondence regarding settlement contract negotiations was submitted.

II. Standard for Summary Judgment

Summary judgment is proper, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

If the party moving for summary judgment does not bear the burden of proof at trial, that party may seek summary judgment by merely "showing — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. However, "if the moving party will bear the burden of persuasion at trial, that party must support its motion with credible evidence that would entitle it to a directed verdict." 477 U.S. at 331 (Brennan, J. dissenting) (not disagreeing with, but further explaining, the majority's analysis); *see also U.S. Fidelity and Guar. Co. v. Planters Bank & Trust Co.*, 77 F.3d 863 (5th Cir. 1996).

In either circumstance, once the moving party has met its initial burden of production, the nonmoving party can defeat a motion for summary judgment by producing evidence sufficient to create a genuine issue of material fact. *Lindsey v. Prive Corp.*, 987 F.2d 324, 327, n.14 (5th Cir. 1993). The substantive law underlying the claims in issue identifies which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "genuine," if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248 (1986).

When ruling on a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold*, 369 U.S. 654, 655 (1962)); *Hansen v. Continental Ins. Co.*, 940 F.2d

971, 975 (5th Cir. 1991). The presiding judge is not to weigh the evidence nor engage incredibility determinations. *Anderson*, 477 U.S. at 249.

III. Analysis

To decide whether the settlement agreement should be enforced, it must first be determined whether there was a binding agreement, and, if so, what the agreement provides. As this case arose in Texas and comes to federal court in diversity, Texas contract law applies. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); Valley *Ranch Dev. Co. v. F.D.I.C.*, 960 F.2d 550, 553 (5th Cir. 1992).

Defendant's May 17, 1993, letter was an offer to pay $100,000 in exchange for "a release of any and all potential claims" against defendant's insurance policy on the vehicle which killed Frances Lumsden. Included with this offer, as an integral part of the term "release of any and all potential claims" was the requirement that all parties with an interest in Frances Lumsden's estate — all parties who might have a potential claim — be identified.

Plaintffs have failed to present evidence that they accepted the May 17, 1993, offer. To form a binding contract, an offer must be accepted "in strict compliance with its terms." *Williford Energy Co. v. Submergible Cable Services, Inc.*, 895 S.W.2d 379, 384 (Tex.App. — Amarillo 1994, no writ); *Lacquement v. Hanty*, 876 S.W.2d 932, 937 (Tex.App. — Fort Worth 1994, no writ). "A material change in a proposed contract constitutes a counteroffer which must be accepted by the other party." *Gilbert v. Pettiette*, 838 S.W.2d 890 (Tex.App. — Hous. [1 Dist.] 1992, no writ); *accord Gasmark, Ltd. v. Kimball Energy*

Corp., 868 S.W.2d 925, 928 (Tex.App. — Fort Worth 1994, no writ). In their letter of June 8, 1993, plaintiff; Wed to identify — or promise to identify — all parties with an interest in Frances Lumsden's estate. Moreover, plaintiff added a term. They requested defendant provide a sworn statement that all applicable policies were as stated in the May 17, 1993, letter. Because of this added term, the June 8, 1993, letter must be considered a counteroffer.[1]

Plaintiffs have failed to present evidence that their counteroffer was accepted. In its letter of June 29, 1993, defendant failed to provide — or agree to provide — a sworn statement as to the applicable policies. Furthermore, the June 29, 1993, letter added a term to the plaintiffs' proposed contract. Defendant required that plaintiffs include Helen Harris in the release of claims or provide documentation that Harris had no potential claim. Thus, defendant's June 29, 1993, letter must also be construed as a counteroffer. *Gasmark*, 868 S.W.2d 925.

The next offer was made by defendant on January 13, 1994. This offer was reiterated on April 11, 1994. Plaintiffs have failed to submit evidence that they responded to either of these two offers. Without acceptance, no contract was formed. Finally, because a reasonable time has past since this offer was made, acceptance is no longer available. *Valencia v. Garza*, 765 S.W.2d 893, 897 (Tex.App. — San Antonio 1989, no writ).

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1. The June 21, 1993, letter from Adkinson seems to comply with the terms of the May 17, 1993, offer by disclosing a list of parties with an interest in Frances Lumsden's estate. However this letter comes too late to be an acceptance, because the May 17, 1993 offer had already died at the hands of the June 8, 1993 counteroffer. *Gasmark*, 868 S.W. 2d at 929. ("Once terminated, an original offer can never be revived.") Moreover, Helen Harris, Frances Lumsden's mother, was not included in the list of parties with an interest in Frances Lumsden's estate.

In conclusion, it must be held that there was never a contract formed. "The parties must have a meeting of the minds, and each must communicate his consent to the terms of the agreement." *Williford*, 895 SW.2d at 384; *accord Lacquement*, 876 S.W. 2d 937. This never occurred in the matter at hand.

IV. Helen Harris

In their amended complaint, plaintiffs also make claims against Helen Harris. "This is a breach of contract between plaintiffs, Liberty Mutual and Helen Harris. In addition, the wrongful conduct of Helen Harris in cooperating with Liberty Mutual and voluntarily accepting the sum of $80,000.00 to the detriment of Plaintiffs herein constitutes fraud upon Plaintiffs committed by Defendant Helen Harris." Harris has not yet filed an answer or otherwise appeared in this action. The cross motions for summary judgment did not specifically address plaintiffs' claims against Helen Harris. Thus, those claims will not be addressed at this time. Accordingly, it is hereby

ADJUDGED that plaintiffs' motion for summary judgment should be, and is hereby, **DENIED.** It is further

ADJUDGED that defendant Liberty Mutual's motion for summary judgment should be and is hereby, **GRANTED.** It is further

ORDERED and **ADJUDGED** that plaintiffs' claims against defendant Liberty Mutual Insurance Company should be and are hereby, **DISMISSED WITH PREJUDICE.**

Appendix C

SIGNED this 31st day of July, 1997.

s/ Wm. Wayne Justice
William Wayne Justice
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 15, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-41541

FRANK A LUMSDEN; CAROLE KAY LUMSDEN; STEPHANIE LUMSDEN CABANISS

Plaintiffs - Appellants

v.

LIBERTY MUTUAL INSURANCE COMPANY; HELEN HARRIS

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Texas, Marshall

ON PETITION FOR REHEARING

Before DAVIS, DUHE, and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

s/ W. Eugene Davis
United States Circuit Judge